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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. ~~1054~~ 126

CHESAPEAKE & OHIO RAILWAY COMPANY, and THE ERIE RAILROAD CO.,

Petitioners,

vs.

LOIS BRAY VERA CRUZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Cases:

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Walker, Inc. v. American Exp. Field Warehousing Corp., (Fla. Cir. 1960) 276 F. 2d 591 7

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CHESAPEAKE & OHIO RAILWAY COMPANY, and THE ERIE RAILROAD CO.,

Petitioners,

VS.

LOIS BRAY VERA CRUZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

Correct as stated in Petitioners' Brief.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION.

There are no additions or corrections to Petitioners' statement of grounds found in the Petition at Page 2.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented are:

1. When a party files a motion and permits the trial court to proceed to judgment without action upon his motion, and fails to request action on said motion from the trial court during approximately the four months said cause pends in the District Court prior to appeal, and fails to request action on said motion during appearances in said District Court subsequent to judgment on Pauper's Petition, and fails to cross-appeal requesting ruling on said motion, and fails to request ruling on motion for new trial during oral argument in the Court of Appeals, can the Court of Appeals find that the motion has been waived or abandoned?

2. Is the Court of Appeals' decision in the case at bar contradictory to the case of *Montgomery Ward* v. *Duncan*, (1949) 311 U.S. 243, 85 L. ed. 147, 61 S. Ct. 189?

CONSTITUTIONAL PROVISIONS, RULES, ETC. INVOLVED.

Rule 74 of the Federal Rules of Civil Procedure reads:

> "Parties interested jointly, severally or otherwise in a judgment may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal."

Supreme Court Rule 19 reads as follows:

> "(1) A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important reasons therefor.* The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: * * *" (our emphasis)

Federal Rules of Civil Procedure, Rule 50(c) reads as follows:

> "(2) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for new trial." (adopted January 21, 1963)

CONCISE STATEMENT OF THE CASE.

Petitioners' statement of the case is satisfactory except for the following omitted items:

1. That the judgment of the District Court N.O.V. did not reserve ruling on Defendants' motion for a new trial. (Transcript of Record, pp. 230, 1, 2)

2. The District Court's order granting Defendants-Petitioners a judgment N.O.V. but without ruling on motion for a new trial was handed down on *October 10, 1961.* (Transcript of Record, pp. 230, 1, 2)

3. Petitioners-Defendants appeared in District Court and argued Respondent's request for Pauper's Appeal on *November 3, 1961.* (Transcript of Record, pp. 246, 7, 8)

4. This cause pended in the District Court until transcript of record was filed on *February 2, 1962*, approximately three months from date of entry of judgment. (Cover of Transcript of Record)

5. At no time during Defendants' appearance in District Court before the judge for hearing on Pauper's Appeal on October 30, 1961, nor during the period of approximately four months this action remained in the District Court until transcript of record was filed in the Court of Appeals on *February 2, 1962*, did Petitioners file or make a motion with either the District Court or Court of Appeals requesting a ruling on their motion for a new trial.

6. That Petitioners made no request of any judge sitting in the District Court in the Northern District of

Indiana, although one was sitting in one of the divisions at all times, nor of the judge of the Hammond Division who had been elevated to the Court of Appeals for the Seventh Circuit, nor of the Court of Appeals for the Seventh Circuit for ruling on their motion for new trial.

7. That no request by Petitioners or notice was given to Respondent of said Petitioners' desire for ruling on said motion for new trial any time after entry of judgment of *October 10, 1961*, during pendency in the District Court.

8. That Petitioners did not cross-appeal asking for ruling on their motion for new trial or to preserve errors.

9. That Petitioners did not during oral argument before the Court of Appeals request or argue their right to ruling on motion for new trial.

REASONS FOR NOT GRANTING THE WRIT.

1. The Court of Appeals was justified in finding waiver or abandonment by Defendants of a ruling on their motion for a new trial as a result of Defendants' failure to make any request of the District Court or Court of Appeals for ruling on their motion for a new trial.

2. The Court of Appeals was justified in finding that by failing to file a cross-appeal asking for ruling on its motion for a new trial, the Defendants had not preserved the question of said ruling, and the issue was waived or abandoned.

3. That the policy against piece-meal appeals should not permit a Defendant to leave motions undisposed of in a trial court and then after reversal of the judgment N.O.V. in its favor ask that the case be again returned to the trial court for ruling on undisposed of motions. This would mean in the case at bar that this cause could reach the Supreme Court of the United States on two appeals after one trial and still not be disposed of since a new trial could result with subsequent appeals.

4. Since the District Court judge in the case at bar is now a member of the Court of Appeals of the Seventh Circuit and a new District Court judge is sitting in the Northern District of Indiana, Hammond Division, the review given this matter by a Court of Appeals by reviewing the record would seem to be as adequate a review as could be had in the trial court by a single judge unfamiliar with the trial.

5. In this case, the Court of Appeals for the Seventh Circuit properly followed the Supreme Court case of *Montgomery Ward & Company* v. *Duncan*, (1940) 311 U.S. 243, 85 L. ed. 147, 61 Sup. Ct. 189.

ARGUMENT.

THERE IS NO CONFLICT OF DECISIONS.

Rule 50(b) of the Federal Rules of Civil Procedure provides for the filing of alternative motions for new trial and for judgment N.O.V.

It is a well-established principle of law that a party who files a motion and permits the court to proceed without requesting ruling on that motion has waived and/or abandoned that motion (*Walker Investment, Inc.* v. *American Exp. Field Warehousing Corp.* (Fla. Cir. 1960), 276 F. 2d 591; *United States* v. *McCoy*, (1904) 193 U.S. 593, 48 L. ed. 805, 24 S. Ct. 528; *Fidelity & C. Co.* v. *Thompson*, 154 F. 484, 11 L.R.A. (N.S.) 1069 (C.C.A. 8th, 1907) 60 C.J.S. Motions and Orders, §42, p. 42; 4 C.J.S. Appeal and Error, §363, p. 1212; 4 C.J.S. Appeal and Error, e. Motion, §321, p. 1026). The obvious logic of this rule is so that a party may not sit back in the trial court leaving one of its motions undisposed of, and then for the first time on appeal complain to the Court of Appeals that said motion was not disposed of requiring a piece-meal appeal with the case remanded to the trial court for ruling on the motion. Where no ruling is made on a motion, it is presumed waived. (60 C.J.S. Motions and Orders, §42, Page 42)

It is also a well-established policy that there should not be piece-meal appeals. (*Libby-Owens-Ford Glass Co.* v. *Sylvania Industrial Corp.* (C.C.A. 3rd. 1946), 154 F. 2d 814; Cert. denied 60 S. Court 1353, 328 U.S. 59, 90 L. ed. (1630).

In *Montgomery Ward & Co.* v. *Duncan* (1940), 311 U.S. 243, 253, 254, 85 L. ed. 147, 61 S. Ct. 189, the Supreme

Court decided that when alternative motions are filed under Rule 50(b) the District Court should rule on both motions so the judgment will be final and piece-meal appeals not required, although the court found because of past procedence in dealing with this situation in the case at bar it should be remanded for new trial ruling. The court said, "If alternative prayers or motions are presented, as here, we note that the trial judge should rule on the motion for judgment. *Whatever his ruling thereon, he should also rule on the motion for new trial, indicating the grounds of his decision* * * * If the trial judge, as he did here, grants judgment N.O.V. and denies a motion for a new trial, the party who obtained the verdict may, as he did here, appeal from that judgment. Essentially, since his action is subject to review, the trial judge's order is an order *nisi*. A judgment on the verdict may still stand, because the Appellate Court may reserve the trial judge's action. This being so, *we see no reason why the Appellee may not, and should not, cross-assign error, in the Appellant's appeal, to rulings of law at the trial, so that if the Appellate Court reverses the order for judgment N.O.V. it may pass on the errors of law which the Appellee asserts nullified a judgment on the verdict.*" (Headnotes 6 & 7, Pages 253, 254)

Thus, in 1940 the *Montgomery Ward* case clearly stated what is now Federal Rule of Civil Procedure 50(c) are in keeping with the judicial principles of requiring a party to obtain disposition of all of his motions in the trial court and not sit back and complain for the first time on appeal of an undisposed of motion and also to avoid piece-meal appeals. (Barron and Holtzoff, 2B Federal Practice and Procedure, S. 1082, p. 438)

The decision of the Court of Appeals for the Seventh Circuit in this case at bar follows the *Montgomery Ward* case which has not been overruled, and is reiterated in Federal Rule of Civil Procedure 50(c), passed January of 1963. The failure of the Defendants to request any ruling on their motion for a new trial from either the District Court or the Court of Appeals prior to the appeal and for some three months while said cause pended in said District Court, and during which time Defendants appeared for hearing on Pauper's Appeal in this action was more than sufficient basis for the Court of Appeals finding that ruling on said motion was waived and/or abandoned.

In addition, under Rule 74 of the Federal Rules of Civil Procedure, authorizing cross-appeals and under the *Montgomery Ward* case indicating that when ruling on motion for new trial is complained of, party filing said motion may raise said issues by cross-appeal. The failure to do so would be abandonment or waiver of said motion. It is repeatedly held that in the absence of a cross-appeal, an Appellee may not attempt either to enlarge his rights under a judgment appealed from or to lessen the rights of an Appellant. (*Morley Const. Co.* v. *Maryland Casualty Co.*, (1937) 57 S. Ct. 325, 327-328, 300 U.S. 185, 191-192, 81 L. ed. 593) The application of this rule is demonstrated by the case of *J. P. Majors & Son, Inc.* v. *Lippert Bros., Inc.* (C.C.A. 10th, 1958), 263 Fed. 2d 650. In this case, Defendant requested judgment N.O.V. and complained of excessive damages. The court reduced Plaintiff's judgment and Plaintiff appealed. Defendant filed cross-appeal raising questions on judgment N.O.V. but dismissed said appeal. The court held it was unnecessary to consider Defendant's motion for judgment N.O.V. since it would have enlarged Defendant's right and must have been raised under cross appeal.

In our cause at bar, the Defendants could have raised all questions as to rights under motion for a new trial by cross-appeal, and to send the action back to the District Court for ruling on motion for new trial would be to enlarge the rights of the Defendants in the case at bar without them having cross-appealed to protect said rights.

If the case at bar is sent back to the trial court for a new trial, it would mean that the Defendants without requested ruling on a motion and allowing case in trial court to be disposed of and appealed without ruling on said motion, and without raising any question as to the propriety of the trial court's conduct or preserving of their right by cross-appeal were in a position of letting error go uncomplained of or unpursued by them until they saw the outcome of other questions on appeal, and if they lose, then require the case to be sent back for rulings on their undisposed of motions causing multiple appeals

In the other Court of Appeals and District Court cases, Respondent submits those courts did not follow the *Montgomery Ward* case nor was the issue of waiver, abandonment and failure to cross-appeal decided.

THE COURT OF APPEALS DID NOT PRE-EMPT THE TRIAL COURT'S FUNCTION.

It is a well-settled principle of law that a Defendant who filed a motion in the trial court must make every effort to see that that motion is disposed of in the trial court, and if he takes no action to obtain a ruling by the trial court, it is a waiver and/or abandonment of his right to such ruling. Obviously, when the basis for the abandonment or waiver is failure to obtain a ruling from the trial court, only a Court of Appeals could make that finding. As with all motions filed in the trial court and undisposed

of, the Court of Appeals must decide if there was any effort to obtain a ruling and/or if it was waived or abandoned. That is purely the function of Courts of Appeals and is no invasion of the trial court's function.

In addition to this Court of Appeal's finding, waiver and/or abandonment of the motion by failing to obtain ruling in the trial court, the Court of Appeals also found that the Defendants failed to present the issues by way of cross-appeal as to the failing to obtain a ruling as required by the *Montgomery Ward* case and policies against piecemeal appeals.

MONTGOMERY WARD & CO. v. DUNCAN IS FOLLOWED BY THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE.

Under headnotes 6 and 7, *Montgomery Ward*, 311 U.S. 253, 254, Supreme Court of the United States clearly requires that the trial court in disposing of alternative motions for judgment N.O.V. and new trial, rule on both motions. They said, "Furthermore, the very circumstances which arose in this case emphasizes the importance of having the District Court first pass upon whether *its error* should result in a new trial or in a judgment finally ending the controversy." (their emphasis) It further clearly requires that a Defendant who wishes to preserve questions raised by a motion for new trial not disposed of by trial court should file a cross-appeal. The court makes it clear that the only reason it sent back the case at bar for ruling on motion for a new trial was that it was the first decision by the Supreme Court on that question and that the procedure of not disposing of motion for new trial when judgment N.O.V. was entered had been followed by the state in which this case was tried in prior cases and years.

Montgomery Ward has stood without reversal or change by the Supreme Court of the United States since 1940, and because of the failure of some courts to follow the procedure set out, was re-stated in the revised Federal Rules of Civil Procedure, Rule 50(c).

Therefore, failure of Defendants to obtain ruling on their motion for a new trial from the District Court as required under the *Montgomery Ward* case would constitute a waiver and abandonment of right to ruling on that motion. In addition, their failure to cross-appeal and preserve questions raised by motions for a new trial would be a waiver and/or abandonment of those errors by the Defendants.

The District Court's judgment N.O.V. in Defendants' favor did not state that ruling on motion for a new trial was withheld or to be made only with reverse. The District Court simply entered judgment N.O.V. for Defendants to hold that Defendants are entitled to a ruling for their motion for new trial in the trial court without having cross-appealed as to those errors would enlarge Defendants' right under the judgment since the right to this ruling was not stated or reserved in the judgment by the trial court.

The Court of Appeals for the Seventh Circuit in the case at bar has followed the *Montgomery Ward* case.

NEW RULE 50(c) SIMPLY REITERATES THE PROCEDURES STATED BY THE MONTGOMERY WARD CASE.

As previously discussed, new Rule 50(c) simply is a restatement of the procedure set out in the *Montgomery Ward* case, supra; and Petitioners could well have familiarized themselves with proper procedures before this court re-stated it for them.

THE REASONS GIVEN IN THE OPINION BY THE COURT OF APPEALS FOR DENYING TO PETITIONERS A RULING ON THEIR MOTION FOR A NEW TRIAL ARE SUPPORTED BY THE EVIDENCE.

There is no evidence in the record whatsoever that Petitioners have ever made any effort to have the trial court rule upon or dispose of their motion for new trial. Nor is there any evidence that said motion was called to the attention of Respondent. The only evidence presented of any effort of Petitioners to obtain ruling on the motion for a new trial in the trial court is their Affidavit that they went to the court and failed to find a judge, which fact is attested to by no other person. Their attorneys are familiar with the practice of filing motions so that their requests are of record. In addition, the transcript of record indicates that Appellant filed application for Pauper's Appeal in the District Court on October 24, 1961, and that on October 30, 1961, parties were in court on hearing for Pauper's Appeal and that said cause pended from the day of judgment on October 10, 1961, until February 2, 1962, when transcript of record was filed in the Court of Appeals without Defendants-Petitioners making any request of record for ruling on the motion or the Court of Appeals that the District Court dispose of said motion for new trial.

In addition, the record of this court and the Court of Appeals has not disclosed any cross-appeal by Defendants-Petitioners to preserve errors of trial court which were basis for motion for a new trial not disposed of.

Although it is probable that either party may insist on the ruling on an undisposed of motion, it would not change the principle of law that says a party desiring to preserve the error or substance of a motion filed must

either obtain a ruling on said motion or make reasonable effort to have produced such ruling, or he will be held to waive and/or abandon said motion. Courts proceed by records, and this court may take judicial notice and assume that attorneys for Defendants-Petitioners knew well how to preserve their right to ruling on errors on motion for new trial by making a request of record for ruling on said motion and filing a cross-appeal when plaintiff appealed. Neither procedure was undertaken by Defendants-Petitioners.

Since Petitioners state they went to court to get a ruling on motion for new trial but found the judge gone, why did they not pursue the ruling since they recognized the proper procedure? Respondent submits that Petitioners could have reasoned that if they left it open and the Court of Appeals reversed the District Court judgment N.O.V. in their favor, that they could further delay the ultimate disposition by asking for a ruling on motion for new trial. It is obvious that with a Plaintiff seeking and a Defendant resisting, any delay or ability to create a more expensive, time-consuming procedure is a victory for the Defendant. It would seem that if Petitioners' Affidavit is true, and they sought a ruling and recognized the proper procedure, and if they wanted the motion for new trial ruled upon, they were fully capable of requesting and obtaining a ruling of record from the trial court before appeal. Respondent submits that Petitioners may have considered that the creation of the possibility of a double appeal was to their benefit, and so made no real effort by a request of record for a ruling on their motion for new trial from the trial court.

THERE WAS ABANDONMENT.

By reason of the arguments already made by Respondent as to Petitioners' failure to pursue ruling of trial court on motion for a new trial and failure to preserve errors by cross-appeal, there was waiver and abandonment by Petitioners of the ruling on motion for a new trial.

There was also abandonment of right to ruling on the motion for new trial by failure of Petitioners-Appellees to request in their prayer in their Answer Brief in the Court of Appeals that the cause be sent back for ruling on the motion for new trial. (5B C.J.S. Appeal and Error, §1803, p. 98)

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SAUL I. RUMAN,

Counsel of Record for Respondent Lois Bray Vera Cruz.

Dated June 5, 1963.